On the witness stand

Learning the courtroom tango

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ABSTRACT

OBJECTIVE To summarize the steps primary care physicians should follow when they are asked to testify in court. To describe standard Canadian courtroom procedures and to suggest practical, tested ways to give successful expert testimony.

SOURCES OF INFORMATION I drew on personal experience from more than 750 trial appearances and the literature on effective testimony.

MAIN MESSAGE Family physicians are in a unique position to offer comprehensive and relevant medical information to judges and juries to assist them in legal decision making. To give effective expert testimony, physicians must recognize the differences between legal and medical "culture" and appreciate the basic rules and structure of courtroom evidence. Employing their skills as patient educators, family physicians can speak confidently about their patients' conditions and needs.

CONCLUSION Increasing demand for family physicians to testify in court requires that they equip themselves with a solid understanding of what expert status enables them to do and that they learn techniques for presenting clear and persuasive evidence.

RÉSUMÉ

OBJECTIF Résumer les étapes essentielles que le médecin de première ligne devrait suivre quand on lui demande de témoigner en cour. Décrire les procédures standard des cours de justice canadiennes, et suggérer des façons pratiques et éprouvées de livrer un témoignage d'expert utile.

SOURCE DE L'INFORMATION Je me suis inspiré de mon expérience personnelle de plus de 750 comparutions à des procès et de la littérature sur la façon efficace de témoigner.

MESSAGE PRINCIPAL Le médecin de famille est dans une position idéale pour fournir aux juges et aux jurés une information médicale complète et pertinente qui les aidera à prendre des décisions judiciaires. Afin de fournir un témoignage expert efficace, le médecin doit tenir compte des différences entre les «cultures» juridiques et médicales, et bien comprendre la structure et les règles fondamentales de la preuve. Forts de leur aptitude à renseigner les patients, les médecins de famille peuvent présenter l'état et les besoins de leurs patients avec confiance.

CONCLUSION Parce qu'ils sont de plus en plus demandés pour témoigner en cour, les médecins de famille doivent faire en sorte de bien comprendre ce que la qualité d'expert leur permet de faire et d'apprendre les techniques qui permettent de présenter une preuve claire et convaincante.

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Benjamin Franklin wrote that an honest countryman between two lawyers is like a fish between two cats. Many family physicians, after enduring their first appearances providing expert testimony, might well sympathize with said countryman. Yet, with a little basic information about the process of testimony and a fundamental "ready" strategy, their next appearances could be more comfortable and their presentation of information more powerful and persuasive.

Sources of information

I drew on personal experience from more than 750 trial appearances and the literature on effective testimony.

Know the environment

Physicians are trained and practise in a specific environment, that of clinical science. A scientific culture identifies and espouses certain values: creativity; empiricism; experimentation; objective description; uncovering general patterns, principles, and relationships; probabilistic evidence; proactive investigation; and a quest for knowledge sometimes independent of its practical use. Haney[1] pointed out that not only does the law not share these scientific values, it espouses an opposite ideology.

Rather than creativity, the law depends on precedent; instead of empiricism, the law accepts authoritative declaration. Instead of the well honed process of collection and analysis of objective data, the adversarial method is used to decide what "facts" are accepted. The law prescribes moral values for how we should behave, rather than relying on a nonjudgmental description of what is seen. Common law is focused on a historical line of single cases; patients' medical decisions are often influenced by physicians' understanding of large populations. Law has no margin for error. Decisions must be made: someone is guilty or not guilty; patients are capable of handling their finances or they are not. Physicians rarely have such absolute certainty. The law does not go looking for problems to solve as science does. Problems come to it.

A family physician in a courtroom is in a foreign land. The language, values, customs, and traditions are unfamiliar. Conversely, the law professionals in this foreign land do not always comprehend the specific ideology that physicians bring to court. This cultural tension will always remain, but understanding differences can help you realize that it is up to you to accommodate the needs of the court.

Family physicians have a unique role among medical specialists in presenting information to the courts. No other expert has the longitudinal appreciation or breadth of understanding of patients' health. While family physicians might be challenged on the witness stand for a lack of objectivity because of their "helping" role, this can be offset by the sheer depth of knowledge of their patients that even a highly specialized expert who examined the patient for just an hour cannot have.

Why you are there

Being an expert witness is not a volunteer position. You are either asked or ordered to attend court. The word "subpoena" translates literally as "under penalty." Experts are called in because someone assumes they have information that is legally relevant in assisting judges or juries ("triers of fact") to make decisions. The benchmark for being an expert is not high; it is generally simply having knowledge above that of the common man. This knowledge must come through experience or training in a particular field.

The courts also suggest that testimony must be based on scientifically reliable information. If physicians present novel medical ideas not generally accepted by their peers, it is likely that that information will not be relied upon or not given any weight. The difference between a normal (or "fact") witness and an expert witness is that experts can offer opinions beyond the facts of what they have personally witnessed. For example, unlike fact witnesses, experts can respond to questions about hypothetical situations posed to them. Experts should be careful in offering opinions and should not think that they are there to make or imply a decision on the ultimate question before the court. Physicians can be called as fact witnesses to describe to the court events or procedures that took place, but this is rare. Calling a physician to be a fact witness would preclude asking a "why" question or departing at all from a simple question about what he or she saw. So, nearly all family physicians are asked to attend court as experts.

An expert must be qualified as such on each court appearance. Having been qualified many times previously does not exempt you from this rule. Scope of expertise can be broad or narrow and can differ for each court appearance.

Lawyers arrange court dates with you; most experts clear a half or full day for this. Most provincial medical associations publish fee guidelines for court appearances that you can bill to the lawyers. You should inform lawyers what this fee will be. Lawyers do not control the timing of appearances exactly, and it will invariably take longer than estimated. Physicians also need to inform lawyers about the salient issues in the case, as even experienced personal injury lawyers are not physicians and might not completely comprehend the nuances of medical facts. A short meeting with the lawyer at the end of your day is often helpful before a court attendance. It is advisable to read up on the subject being addressed in court; electronic searches are very useful. When asked about whiplash injuries, for example, it carries weight

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when an expert responds, "I'm glad you asked me that question. Just this week in the *New England Journal of Medicine* an article addressed that very issue...."

Practical and procedural issues

The number 1 question professionals ask about expert testimony is What do I wear? I always respond "dress for a funeral and hope it's not your own." Dark business attire (black or navy) with minimal adornment is best. The courtroom is one of the most conservative venues our society has. There are flags hanging, official coats of arms, the Queen's picture, and gowned judges; even the lawyers wear robes in federal courts. This is not a place for promoting the new casual-Friday look. The formal look must be balanced with comfort—the witness stand is just that in most areas of Canada—you stand. While you may ask for a chair, most experts find that testimony delivered from a standing position carries more authority. Comfortable shoes are a must for experts.

Location

When heading to the courthouse, make sure you have clear instructions which court you are to attend. In many urban centres, there are many courthouses, federal trial courts, provincial trial courts, special courts for domestic cases, and so on. Testimony by telephone or video is now accepted in Canada when a courtroom is in a remote location. The dynamics of the courtroom are lost using these technologic aids, but this could be a growing trend due to the economic burden of bringing experts to distant courtrooms.

When you arrive at the courthouse, schedules for the various courtrooms are posted on bulletin boards or video screens. Go to the right room and arrange to meet the lawyer outside. In many cases, experts are not allowed in courtrooms to listen to other witnesses. In other cases it is the reverse, and lawyers want you to listen and incorporate what you hear into your opinions. Experienced witnesses know that they will often be waiting for long periods before they testify. This allows them time to review the material on the case or do other work.

Confidence

When you enter the courtroom, do not do so timidly. The witness stand is beside the judge (often there are 2 sides) and is identified by a microphone and usually a glass of water. Walk to the stand as if you could not wait to start testifying. Your attitude will be as influential as the words you speak.

On nearly all witness stands water is provided, but gulping down a glassful is not advisable. First, it signifies you are nervous. Second, water is rarely beneficial for vocal cords (a cup of hot tea would be better, but unfortunately is not on the menu). Last, adrenaline often causes fine motor tremor. Most court appearances will raise your adrenaline levels, not because you are necessarily nervous but because you are concentrating. You might have been sailing along giving outstanding testimony, and then pick up a flimsy plastic cup of water to refresh yourself and spill it all over your best suit. There goes your testimony. If you really must have some water, sip a little during breaks in your testimony.

Supporting documents

Remember that anything you take to the stand can be examined by either side. I once had the contents of my briefcase examined while I was on the stand. The opposing lawyer looked for a document he thought I might have brought with me, but this was an intimidation tactic. Typically, you should bring documents you feel necessary for your testimony. Ask the judge if you may refer to documents, when and if the need arises. If you have been subpoenaed to testify, the order does not usually cover documents, only your person. If there is some germane material on which you base opinions, however, you should bring it.

The oath

Before you are allowed to testify, you must take an oath to tell the truth holding the Bible in your right hand (not in your left with your hand upraised). Since 1888 in Canada, a nonsacred affirmation has been allowed as a substitute for the oath. The oath procedure is carried out by the court clerk, and it is best to let him or her know if you are going to affirm rather than take an oath. If you practise a religion other than a form of Christianity and want to take an oath on a parallel sacred book, bring it with you. Before you take the oath, you will be asked to spell your full name for the clerk.

Review of credentials

After you have been sworn or affirmed, your credentials will be reviewed before the judge pronounces that you can testify as a witness. You should have 4 copies of your curriculum vitae ready (even if you already sent the lawyer a copy) for the 2 lawyers, the court, and yourself. It should highlight the important accomplishments of your professional career and, during the qualifying process, the lawyer might want you to underscore any specific qualifications that relate to the case being tried. Your qualifications might be challenged, but this is often a testing of the waters for opposing counsel, as all family physicians would be deemed qualified to provide expert testimony on general medical practice.

Examination

When the judge pronounces that you can provide expert testimony, you will then be questioned by the lawyer who called you. This is direct examination or examination-in-chief. Many experts help the lawyer prepare a series of questions. There are 2 styles of examination: short questions that require yes or no answers, or the

more effective technique of free narrative where the lawyer asks you basic questions and gives you some leeway in your answers. During testimony the judge or jury need to understand the story you tell. Start at the beginning and go through until the end. With medical procedures, first describe them, then tell what the outcome or interpretive result is. The "story model" of testimony has been shown to be very effective in helping judges and juries remember your testimony.

Cross-examination

After you have finished direct examination, the fun begins—cross-examination. I spend about twice as much time preparing for cross-examination as I do for direct examination. I simply ask "What questions would I have for me if I were sitting at the opposite table?" Most experts are very good at seeing the weaknesses in their own cases and preparing answers to potential questions. One of the biggest problems that novice experts have is accepting the role of opposing counsel. As Shakespeare wrote in *The Taming of the Shrew* "...and do as adversaries in law do—strive mightily but eat and drink as friends." Like great sportsmen, legal opponents can battle strenuously but then be the best of friends after. This is easier said than done. We humans can become emotionally involved in court debate. Professional relationships among all parties can be achieved, however. The opposing lawyer has a job to do, and it is his or her obligation to test your testimony through the adversarial process. There are many books on cross-examination techniques.[2,3]

Most lawyers stick to a basic style but vary it depending on the witness. If the witness shows signs of being unsure, hesitant, or timid, a forceful bullying barrage might follow. This is not a technique that will have any success with an experienced expert, who will simply let the tyrant run out of steam. A more clever approach to cross-examination is the flattery technique: "Thank you for taking time out of your busy schedule to help us here today, doctor. I only have a few questions for you...."

Do not expect to see the dynamite surprise questions that appear on popular television shows featuring trial testimony. It should go without question that you should tell the truth. Everyone tells white lies in their day-to-day lives to make life more convenient. These are not generally harmful, but under oath, lies of any colour are never permitted. Admit to any shortcomings of your investigations or opinions. Remember that the standard of medical practice is not perfection.

In answering a cross-examination question, hesitate for a moment. This allows you to gather your thoughts and gives the lawyer who called you an opportunity to object to the question. You might not even have to answer. When replying to questions, keep it simple. Less is more. The witness box is not an opportunity for you to expound on your latest medical theories. Speak up, but slowly. The microphone on the witness stand records, not amplifies, your words. And remember, every word you say will be recorded for all to see. If you do not understand a question, ask for it to be repeated or rephrased. When you do this, the lawyer might simply drop the question.

Questions in cross-examination are like chess moves. They are not isolated but strung together and usually headed toward a final question of some importance. I have often heard a lawyer repeat questions beginning with the phrase "Doctor, don't you agree...?" I know with those words that he or she is heading to a question where he or she wants me to agree with something that I do not want to agree with. You should be able to predict the direction of the questions, if you are alert to this fact. Also, watch qualifying phrases: few things in life are "never" or "always." Be wary of metaphors and analogies. When asked, "Isn't memory just like a video recording?" you can reply, "Actually it is nothing like that." Above all, listen carefully to the question before answering. Do not avoid professional jargon, but when you do use it, explain or define what you mean.

Eye contact

In giving testimony, your answer should be directed toward the "triers of fact" (judge or jury). In a jury trial, look at the members of the jury when you answer, make eye contact with all of them, or turn and look at the judge occasionally when responding. This is appropriate courtroom etiquette and lets the triers of fact know that you understand who is making the decisions. It also helps them establish a connection with you. When addressing the judge directly, use the proper titles: "M'lord" or "M'lady" for federal court judges and "Your Honour" for provincial court judges. Once when I was responding to a question in cross-examination and looking at the jury, the lawyer asking the questions walked away from his podium to the side of the courtroom opposite the jury, hoping that my gaze would follow him and stay away from the jury who were nodding their heads in enthusiastic agreement with me.

Scientific literature

Sometimes lawyers use scientific literature to challenge your opinion. They use medical literature as an opposing expert to you. You can shut the door on this tactic by simply saying, "I don't recognize that article (or book) as authoritative." If you do not "recognize" the text, the article cannot be entered in opposition. This is harder when the book quoted from is your own. To avoid responding to a literature misquote, ask to see the passage and read it for yourself. One lawyer held up an article he suggested challenged my opinion. I was not aware of the article, so the judge recessed the court for me to read it. I returned and was able to point out the many weaknesses of the study and it quickly passed over. If opposing counsel want to challenge your expertise, let

them hire their own expert rather than taking the lazy way of finding a seemingly contrary written opinion.

Slights

With outright slights (these are rare), such as, "You have only been in practice for 2 years, I see," or calling a female physician by the title "Mrs," be oblivious and polite. The court will recognize who has dignity and who is showing disrespect. I have seen judges become indignant with such tactics and correct the offending lawyers. If a lawyer needs to use such tactics, he or she is either an unskilled lawyer or has nothing of substance to oppose your opinion. It is hard to remain cool when being harassed, but simply remember you are not the one on trial.

If you are asked to answer only yes or no to a question, you have a right to refuse, as you took an oath to "tell the truth, the whole truth." You, as a witness, also have the right to speak directly to the judge about a point if you think you have not been given full opportunity to answer a question. As an expert witness, you can exert a good deal of control over your own testimony. If you answer yes or no to a question, do so *after* you have given the qualifiers, not before. After saying "Yes, but..." you might be thanked for your testimony and dismissed.

After cross-examination

After the cross-examination, the lawyer who called you to testify might have further questions, but these can only be about information that arose in the cross-examination. There can be further questioning by the opposing counsel (re-cross) but only about information that arose in the re-direct examination. The examinations, therefore, become shorter and shorter. Before you leave the stand, the judge has an opportunity to ask you questions. Some like to do this, while others prefer to let the lawyers ask all the questions. When there are no other questions, the judge will thank you for attending and permit you to leave. As you do so, exit as if you had triumphed. Do not sigh, mop your brow, or look dejected and slink out of the courtroom. Your attitude will be noted by the jury. If you look satisfied with your testimony, it must have been good. Before you exit through the court doors, turn and face the judge and slightly bow your head before leaving. He or she will often return this in a sign of reciprocal respect.

Testimony superperformance

You are called to court to have an influence, so why not do it in the most effective way? Empirical studies of expert witnesses have found that 2 factors increase influence with judges and juries besides the level of expertise of the witness: dynamism and trustworthiness.[4] Dynamism refers to a style of delivery that is bold, active, energetic, friendly, frank, and empathetic. It signals that you care about your topic. Trustworthiness is credited to people who are perceived to be honest, objective, unselfish, and just. Experts who know their limits and occasionally say, "I don't know" raise their credibility. While these 2 factors come naturally to some witnesses, they are good for any witness to project.

The great Roman statesman Cicero wrote, "The aim of forensic oratory is to teach, to delight, to move." For novice experts, the first goal, to teach, should be the only goal. More experienced experts can move on to more dramatic presentations and occasional use of humour. In the middle of a murder trial, a touch of humour helps deflate the tension, but it can easily backfire. Use it with caution.

EDITOR'S KEY POINTS

- Family physicians are sometimes asked to testify in court. They often dread doing this because they lack experience and because the culture of courtroom and legal proceedings is completely different from that of medical practice.
- The testimony of family physicians can be extremely valuable, however, because they have often had long-term relationships with their patients. A family physician can be a true "expert witness."
- Family physicians can increase their credibility and the strength of their testimony by being familiar with courtroom procedures and by carefully preparing for giving testimony, especially by anticipating cross-examination questions.
- Physicians should listen carefully to questions being asked and keep their answers straightforward and focused. They should not feel intimidated by lawyers, as they can refuse to answer a question or appeal to the judge to rule on whether they should answer.

POINTS DE REPÈRE DU RÉDACTEUR

- Le médecin de famille est parfois appelé à témoigner en cour. Il redoute souvent de le faire, par manque d'expérience et parce que la culture des cours de justice et des procédures légales est complètement différente de celle de la pratique médicale.
- Toutefois, le témoignage du médecin de famille peut être d'une très grande valeur à cause de sa longue relation avec le patient. Un médecin de famille peut être un véritable «témoin expert».
- Le médecin de famille peut accroître sa crédibilité et la force de son témoignage en se familiarisant avec les procédures de la cour et en préparant minutieusement son témoignage, notamment en prévoyant les questions du contre-interrogatoire.
- Le médecin devrait écouter attentivement les questions qui lui sont posées et s'en tenir à des réponses simples, en lien direct avec les questions. Il ne doit pas se sentir intimidé par les avocats, puisqu'il peut refuser de répondre à une question ou en appeler au juge pour décider s'il est tenu de répondre.

Advanced tactics

Another tactic of expert testimony is the "Rumplestiltskin" technique. Know the names of the lawyers and the judge in the trial and have them written on the cover of your file. Use these names when addressing them. It is often disarming to lawyers to know that *you* know *their* names: "No, Mr Cochran, I don't agree that if the gloves don't fit, you must acquit." Another well known technique is the "push-pull" method. When asked a question under cross-examination, say, "That's an excellent question. I'm glad you asked that (something no lawyer wants to hear), and you are absolutely right...." When lawyers push on the door, do not push back, but pull, and they will find themselves on the floor.

As you develop your skills as an expert witness, you might find increasing demand for your services. Many resources can help health care professionals increase their skills as expert witnesses.[5-8] The role of an expert witness carries a high level of responsibility, one that family physicians carry every day. Testimony is an opportunity to showcase the current knowledge of the profession and demonstrate how the learned foundations of the discipline can be useful in legal decisions.

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One day, taking a pair of shoes to be mended, he saw the cobbler's wife seated by the fire, suffering from the terrible symptoms of heart-disease and dropsy, which he had witnessed as the precursors of his mother's death. He felt a rush of pity at the mingled sight and remembrance, and, recalling the relief his mother had found from a simple preparation of foxglove, he promised Sally Oates to bring her something that would ease her, since the doctor did her no good.

George Eliot (1819-1880)
Silas Marner

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